THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0181, Fred Lowell & a. v. City of Portsmouth Planning Board & a., the court on February 12, 2008, issued the following order:

The petitioners, Fred Lowell and Al McElaney, sought a writ of certiorari in superior court to review the decision of the City Council for respondent City of Portsmouth (City) to deny their application for a driveway permit. The Superior Court (McHugh, J.) granted the requested relief. The City appeals this decision. We reverse and remand.

The record on appeal supports the following. In 2002, the petitioners purchased the subject property located on Deer Street in Portsmouth. The property had previously been used as a senior center, and the petitioners invested time and money converting it into a residence. Since July 2004, they have attempted to obtain a driveway permit for the property. The proposed driveway would be nine feet in width and permit the parking of two motor vehicles. A vehicle using the driveway would have to back out across a city sidewalk onto Deer Street; this section of Deer Street has a large volume of pedestrian and vehicular traffic.

The petitioners first applied for a permit in July 2004. Based upon the recommendation of its traffic and safety committee, the City Council denied this application.

The petitioners applied again in 2006. This application was reviewed by respondent City of Portsmouth Planning Board, which voted to recommend to the City Council that the application be denied. The petitioners moved for reconsideration, which the planning board denied. The petitioners appealed the planning board's decision to respondent City of Portsmouth Zoning Board of Adjustment, which concluded that it lacked jurisdiction to hear the appeal. Subsequently, the City Council adopted the planning board's recommendation and denied the petitioners' 2006 application for a driveway permit.

Thereafter, the petitioners appealed the decisions of the planning board and zoning board of adjustment to the superior court. The City moved to dismiss both appeals on the ground that the court lacked jurisdiction to hear them under either RSA 677:4 (Supp. 2007) or RSA 677:15 (Supp. 2007). While the Superior Court (Fitzgerald, J.) agreed, it nonetheless denied the City's motion to dismiss. Instead, it granted the petitioners' motion to amend their

petition to include review of the City Council's decision, and ruled that it would review that decision "to determine whether that body has acted illegally in respect to jurisdiction, authority or observance of the law, or has abused its discretion or acted arbitrarily, unreasonably or capriciously." See Citizens of E. Derry Fire Precinct v. Town of Derry, 148 N.H. 510, 512 (2002) (when reviewing on certiorari, reviewing court determines "whether another tribunal has acted illegally in respect to jurisdiction, authority or observance of the law or has engaged in an unsustainable exercise of discretion or acted arbitrarily or capriciously" (quotation omitted)).

Before the trial court, the petitioners argued that they had a right under the zoning ordinance to a driveway and, therefore, the City had no authority to deny their application because of safety concerns. The trial court impliedly rejected this assertion, ruling: "Unless the Court concludes that the request is unsafe then under the law the [petitioners] are entitled to a driveway permit." Based upon its review of the certified records of the planning board and zoning board of adjustment, the parties' pleadings and their arguments at the hearing, the trial court concluded that the City Council erred when it found that the driveway would be unsafe.

In its order on the merits, the trial court applied a different standard of review than it had previously articulated, reviewing the City Council's decision to determine whether it was "illegal or unreasonable." See Heron Cove Assoc. v. DVMD Holdings, 146 N.H. 211, 213 (2001) (citing standard of review under RSA 677:15, under which trial court "review[s] the decision of a planning board, and may reverse, affirm, or modify that decision where there is an error of law or when the decision is unreasonable" (quotation omitted)); see also DHB v. Town of Pembroke, 152 N.H. 314, 319 (2005) (noting that standards of review for a petition for writ of certiorari and a petition under RSA 677:15 differ). As the City did not challenge the trial court's standard of review in its motion for reconsideration, and has not argued on appeal that this standard was incorrect, we assume, without deciding, that the trial court applied the correct standard of review. See DHB, 152 N.H. at 319. Under this standard, the trial court was entitled to "reverse or affirm, wholly or partly, or . . . modify" the City Council's decision if "there [was] an error of law or . . . the court [was] persuaded by the balance of the probabilities, on the evidence before it, that said decision [was] unreasonable." RSA 677:15, V; see DHB, 152 N.H. at 319. Under this standard, the trial court may not substitute its judgment for that of the City Council. See Cherry v. Town of Hampton Falls, 150 N.H. 720, 724 (2004).

When a trial court uses this standard of review, we will uphold its decision "unless it is not supported by the evidence or is legally erroneous." DHB, 152 N.H. at 319. When determining whether a decision is supported by the evidence, we look to whether a reasonable person could have reached the

same decision as the trial court based upon the evidence before it. Id. at 319-20.

The City asserts that the City Council acted reasonably and lawfully when it denied the petitioners' application for a driveway permit because of safety concerns. In finding to the contrary, the City contends that the trial court improperly "substituted its own judgment . . . instead of . . . defer[ring] to the City's engineering professionals in the Public Works Department, the City's Planning Board, the City's Traffic & Safety Committee and the City Council."

The trial court found that the only opinions that the driveway was unsafe came from "various City Officials" including the deputy director of public works and the deputy police chief. While the trial court stated that it was "not prepared to rule that these Officials did not have the knowledge or experience to render a reliable opinion on the issue of safety," the court observed that their opinions were "to some extent colored by the possibility of reconfiguration of the intersection in the vicinity of the [petitioners'] property." The trial court ruled that given that the intersection had not yet been reconfigured, and might never be reconfigured, the City Council acted improperly by denying the driveway permit application based upon the potential reconfiguration. Further, the court stated that it was "not convinced that even if the intersection is reconfigured such that it is moved closer to the [petitioners'] driveway that there would be an unsafe condition that would manifest itself at that time."

We agree with the City that in discounting the evidence upon which the City Council relied to find the driveway unsafe, the trial court impermissibly substituted its judgment for that of the City Council. It was the City Council's function to weigh the evidence before it, not the trial court's. Lone Pine Hunters' Club v. Town of Hollis, 149 N.H. 668, 671 (2003). The trial court's review was not to determine whether it agreed with the City Council's findings, but "whether there is evidence upon which they could have been reasonably based." Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 583 (2005) (quotation omitted). In effect, the trial court reviewed the evidence de novo. This was error. See Lone Pine Hunters' Club, 149 N.H. at 670. While ordinarily we would end our analysis here, because we have before us the same record that was available to the trial court, we will address whether it supports the City Council's finding that the driveway was unsafe. See id.

The evidence before the City Council as to whether the driveway was unsafe was conflicting. On the one hand, the director of public works opined that the driveway was unsafe as proposed because it would allow cars to back across an active sidewalk in close proximity to a crosswalk and to back onto a busy street in a very heavily utilized intersection. Specifically, the minutes of the planning board reflect the following:

> [The director of public works] felt this was a highly urbanized residential street and this driveway would back out and be in close proximity to a very highly traveled intersection where, at peak hour, 700 cars traverse that intersection daily. The City did a [traffic study in December 2005] . . . which showed 876 cars in one hour [in the evening] and Saturday mid-day showed 790 cars in one hour. That's anywhere from 11 to 13 cars every minute so he would not classify this as a lightly traveled road. [The director of public works] indicated that there was a large hotel right across the street and there are a lot of people traversing the area at both ends of the block, going to the downtown area. And, there is another hotel being constructed so it will get worse. In ten years from now, projected volumes at this intersection will go to 760 in the morning, 960 in the evening and 860 in mid-day. . . . [The director of public works] did not sit on [the City Council's] Traffic & Safety [Committee] when they reviewed this request but he has reviewed their findings and they are the same findings that he has today which are problems with pedestrian safety, site [sic] distance, and a heavily traveled intersection.

On the other hand, the petitioners presented a memorandum from TEPP LLC, a transportation engineering planning and policy company, stating that the organization had reviewed the proposed driveway and concluded that it was "reasonably located and [could] accommodate safe vehicle ingress and egress, appropriate for the low speed and low volume of this residential street." TEPP LLC further concluded the proposed driveway would not adversely affect area parking, and that it conformed to applicable zoning regulations.

In light of the conflicting evidence before the City Council, we cannot say that its factual finding that the driveway was unsafe is unreasonable or unsupported by the evidence. See id. at 671.

The petitioners contend that the evidence before the City Council was insufficient to support a finding that the driveway was unsafe, in part, because it consisted only of the subjective opinions of various city officials. While a municipal body "is entitled to rely, in part, upon its own judgment and experience when reviewing applications for various land uses," its "decision . . . must be based upon more than the mere personal opinion of its members." Richmond Co. v. City of Concord, 149 N.H. 312, 316 (2003) (citation omitted). The record demonstrates that the City Council did not solely rely upon its own judgment and experience when reviewing the petitioners' application. Accordingly, we find no error.

The petitioners contend that they have a constitutional right to a driveway, which the City's actions have violated. The trial court did not rule

upon this assertion, and we decline to do so in the first instance. Moreover, we need not address the parties' arguments regarding the trial court's interpretation of the zoning ordinance; the trial court ruled that the zoning ordinance allowed the City to deny an application for a driveway permit for safety reasons, and no party has challenged this interpretation on appeal.

For all of the above reasons, therefore, we reverse the trial court's decision and remand for further proceedings consistent with this order.

Reversed and remanded.

BRODERICK, C.J., and DALIANIS, DUGGAN, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk